No. 83-2098

IN THE

Supreme Court of the United States

October Term, 1983

BENJAMIN H. SASWAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May the United States constitutionally investigate and prosecute for refusal to register with the Selective Service only those individuals who are selected pursuant to an enforcement program designed to identify vocal opponents to draft registration?

2. Is the defendant in a federal criminal trial entitled to testify regarding his intent, where specific intent is an element of the offense and the prosecution has introduced evidence of intent against him in its case in chief?

3. *Toussie v. United States*, 397 U.S. 112 (1970), held that failure to register for the draft is not a continuing offense and that the statute of limitations therefore begins to run at the end of the period for registration prescribed by presidential proclamation. In 1971 Congress extended the statute of limitations.

   (a) Is nonregistration now a continuing offense?

   (b) If not, may this conviction be upheld in light of instructions to the jury that it could convict either for a failure to register during the period set forth in the presidential proclamation, or for a continuing offense?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BENJAMIN H. SASWAY respectfully petitions this Court for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Ninth Circuit entered on February 2, 1984, upholding a prison sentence imposed upon him for refusing to register for the draft.

OPINIONS BELOW

The unpublished Memorandum of the Court of Appeals, filed on February 2, 1984, appears in the Appendix at A-1. The Order of February 9, 1984, by the Hon. William Norris, Circuit Judge, appears in the Appendix at A-3. The Order of the United States District Court of August 19, 1983, denying petitioner's motion to dismiss the indictment for reasons of selective prosecution appears in the Appendix at A-5. The District Court's ruling on August 18, 1982 (R.T. 296-298) denying said motion appears in the Appendix at A-7.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 2, 1984. A timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied on April 25, 1984 (A-22).

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech. . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATUTES AND REGULATIONS INVOLVED

50 U.S.C. App. Section 453(a), which is set out in full in the Appendix at A-18, provides in pertinent part that males aged 18 to 26 may be required to register for the draft "at such time or times and place or places and in such manner, as shall be determined by proclamation of the President and by rules and regulations. . . ."

50 U.S.C. App. Section 462(a), which is set out in full in the Appendix at A-18, provides that "any person" commits an offense who "knowingly . . . evades or refuses registration. . . ."

50 U.S.C. App. Section 462(d), which is set out in full in the Appendix at A-19, prescribes the period during which any prosecution for nonregistration with the Selective Service must be commenced.

Presidential Proclamation 4771, of July 2, 1980, 3 C.F.R. 82 (1981), which is set out in full in the Appendix at A-19, provides in pertinent part that "persons born in the calendar year 1960 shall present themselves for registration on any of the six days beginning Monday, July 21, 1980," (Section 1-102) and that persons who would have been required to register at a certain time but for "some condition beyond their control such as hospitalization or incarceration, shall present themselves for registration within 30 days after the . . .termination of the condition which was beyond their control." (Section 1-109).

STATEMENT OF THE CASE

Petitioner was the first person to be indicted for failure to register for the draft under the Selective Service registration program initiated in 1980.

On June 30, 1982, petitioner was indicted in the Southern District of California for failure to register for the draft. He was found guilty by a jury and on October 4, 1982, was sentenced to 30 months in prison, the harshest sentence imposed for a Selective Service offense since the Vietnam era. On February 2, 1984, a panel of the Ninth Circuit affirmed the conviction by unpublished memorandum (A-1), holding that *United States v. Wayte*, 710 F.2d 1385 (9th Cir., 1983), *cert. granted*, No. 82-1292, May 29, 1984, was controlling on the issue of selective prosecution. Other issues were summarily dismissed, including the District Court's refusal to permit petitioner to testify regarding his intent, and the question of whether failure to register is a continuing offense.[1] The Honorable William Norris, Circuit Judge, filed an "Order" in this case on February 9, 1984, stating the view that *Wayte* was wrongly decided and should be overruled. (A-3).

1. *The Duty to Register*. The legal obligation to register for the draft is defined in three sources: the Military Selective Service Act, 50 U.S.C. App. Section 453; Presidential Proclamation 4771 of July 2, 1980, 3 C.F.R. 82 (1981); and the Selective Service regulations, 32 C.F.R. part 1615.

Section 453 of the Act (A-18) provides that males from 18 to 26 may be required to register for the draft, and delegates to the President the authority to require and define the act of registration. Presidential

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[1] This is one of several cases on which petitions for writs of certiorari have been or will be filed on issues raised in this petition. The cases include: *United States v. Wayte*, No. 83-1292, in which this court granted a petition for writ of certiorari on May 29, 1984, on the issue of selective prosecution; *United States v. Schmucker*, 721 F.2d 1046 (6th Cir., 1982), in which the government has announced it will file a petition for certiorari on the issue of selective prosecution (*See, Wayte*, No. 83-1292, Brief for the United States, 14, n. 8); *United States v. Eklund*, No. 82-2505, 8th Cir., 1984, in which the defendant-appellant has petitioned on the issues of selective prosecution and continuing offense; *United States v. Martin*, No. 82-2425, 8th Cir., 1984, in which the defendant-appellant has petitioned on the issue of continuing offense.

Proclamation 4771, issued by President Carter on July 2, 1980 (45 Fed.Reg. 45247) (A-19), directed males born in 1960 and later to register during certain periods of times and at certain places. Those who, like petitioner, were born in 1960, were directed to register during the six-day period beginning on Monday, July 21, 1980, and ending July 26, 1980. The Director of Selective Service issued regulations "to provide revised procedures for the administration of registration. . . ." 32 C.F.R. Part 1615.[2]

2. *The Government's "Passive Enforcement" System.* Prior to the indictment in this case over 500,000 eligible young men had failed to register. In response, the Selective Service designed what it termed a "passive enforcement" system for selecting non-registrants for investigation and prosecution. This system, in design and result, identified for investigation and possible prosecution only vocal protesters against the registration program.

Since its inception in January, 1981, the government's passive enforcement system has resulted in the indictment of only 16 young men, all vocal dissenters against the draft registration program. Fifteen of these, including the petitioner, were selected on the basis of letters they had written to government officials announcing their principled refusal to register and their later adherence to that position.

The Justice Department deliberately participated in the passive enforcement system, and the only nonregistrants investigated or prosecuted were those whose names were produced by that system. David J. Kline, Senior Legal Advisor, General Litigation Section, responsible for registration enforcement, testified at pre-trial hearings that he became concerned about the issue of selective prosecution almost immediately after he was assigned to supervise enforcement in July, 1980 (R.T. 172-173~~; A-11);~~ but that the Justice Department did not consider it necessary or appropriate to modify the Selective Service procedures (R.T. 118-119; A-11-12).

The government has consistently understood that application of the passive enforcement system necessarily means that all young men who are prosecuted will be persons who have voiced dissent against the draft and draft registration. Memoranda exchanged among high-ranking Justice Department officials predicted "thorny selective prosecution

[2] These regulations have no relevance to this case in its present posture.

claims," and recommended development of an "active" enforcement program which would allow the government to "create an appropriate selection criterion, most probably one based on randomness." See *United States v. Wayte*, 549 F.Supp. 1376, 1381 (C.D. Cal. 1983). One letter from an Assistant Attorney General warned of the serious First Amendment problems inherent in the system and included the statement:

> Indeed, with the present universe of hundreds of thousands of nonregistrants, the chance that a quiet nonregistrant will be prosecuted is probably about the same as the chances that he will be struck by lightning.

Despite these anticipated problems with the "passive enforcement" system, the government, in the interest of expediency, chose to proceed with the prosecutions of the persons selected by that system (R.T. 118-119; A-11-12).

3. *The Indictment of Petitioner and the Proceedings Below.* The June 30, 1982, indictment of petitioner reads in pertinent part:

> Beginning on or about July 27, 1980, and continuing up to the date of the return of this indictment . . . defendant BENJAMIN H. SASWAY . . . did knowingly and wilfully fail, evade and refuse to present himself for and submit to registration. . . .

Petitioner had previously written letters to the President and to the General Counsel for the Selective Service System expressing his opposition to the draft registration program and his intention not to register.

In the proceedings below, petitioner raised all of the issues here included. Pretrial motions, including a motion to dismiss the indictment for reasons of selective prosecution, were set for hearing on Monday, August 16, 1982. Petitioner had requested an evidentiary hearing and discovery on the issue of selective prosecution. An evidentiary hearing was granted, the trial judge ruling that "the defense has carried the burden of securing the hearing" (R.T. 9; A-13) and that the burden was now upon the government; but he denied all defense requests for discovery on the selective prosecution issue, and denied the defendant adequate time to prepare, insisting that the hearing proceed forthwith.

When petitioner sought to file additional documents, they were rejected as not timely. Consequently, petitioner had no discovery whatever in connection with the issue of selective prosecution except what the government chose to produce at the evidentiary hearing, and petitioner was denied a reasonable opportunity to produce evidence. The District Court denied the motion to dismiss for selective prosecution (R.T. 296-298; A-7) and on August 19, 1982, filed its written order denying the motion (A-5).

During petitioner's trial, the government produced as part of its case in chief numerous statements and excerpts of statements by petitioner concerning his intent, motive and reasons in not registering. These included his letters to the President and the Selective Service General Counsel, edited portions of video-taped interviews, newspaper articles and the testimony of a newspaper reporter. Petitioner willingly took the stand in his own defense and repeatedly attempted to testify about his intent in failing to register. His offers of proof were summarily rejected and the trial judge refused to permit petitioner to testify concerning his intent (R.T. 373A-373B, 580-581, 586-587, 626-628, 630-631; A-8 — A-11, A-13 — A-16). On the element of knowledge of the obligation to register, the trial judge ruled on the basis of one item of government evidence that knowledge had been proven and that defense evidence on the issue was therefore "irrelevant" and "immaterial." (R.T. 411; A-16). In consequence, the peititoner was denied the right to present his own testimony on these matters to the jury.

On appeal the panel ruled that the trial judge acted within his discretion in excluding this testimony.

Petitioner requested a point for charge specifying that he could only be convicted if the jury found that he knowingly and wilfully refused to register for the draft during a period of time when he had such an obligation under the presidential proclamation, *i.e.*, between July 21 and July 26, 1980.[3] Instead the Court charged the jury that failure to register for the draft was a continuing offense, thus extending the time period during which the jury could find wilfullness by nearly two years, up to the date of the indictment. On appeal the Ninth Circuit panel ruled that it need not reach the issue of whether non-registration is a continuing offense because the jury might have relied on the indictment's "on or about"

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[3] A motion to dimiss the indictment had also been filed on this ground and denied.

language and found the petitioner guilty of wilfully failing to register during the six-day proclamation period.

A timely petition for rehearing was denied. Petitioner remains free on $10,000 bail pending appeal.

REASONS FOR GRANTING THE WRIT

1. This Case Presents the Same Question--Whether the "Passive Enforcement" System of Selective Service Registration Constitutes Selective Prosecution in Violation of the First Amendment--as that on Which Certiorari was Granted in *United States v. Wayte*, No. 83-1292, on May 29, 1984.

The Ninth Circuit's per curiam memorandum below merely cites *United States v. Wayte*, 710 F.2d 1385 (9th Cir., 1983) in rejecting the petitioner's defense of selective prosecution in violation of the First Amendment (A-1). Petitioner had moved to dismiss the indictment on selective prosecution grounds. After a hearing the motion was denied by the District Court. On May 29, 1984, this Court granted certiorari on that issue in *Wayte*, No. 83-1292. Accordingly, the petition in this case should either be granted and consolidated for consideration in tandem with *Wayte*, or else should be held for disposition in light of this Court's eventual opinion in *Wayte*.

2. The Ninth Circuit's Ruling that the Trial Judge had "Discretion" to Exclude the Petitioner's "Irrelevant" Testimony, Offered on the Issue of Intent, Contradicts the Long-Standing Rule of Law in this Court and Conflicts with the Fourth Circuit's Decision in an Identical Case.

This case presents several important issues having to do with the conduct of the trial. During the trial the petitioner attempted to testify about his state of mind at the time the indictment charged that he "did knowingly and wilfully fail, evade and refuse to present himself for and submit to registration." The prosecution introduced evidence of intent against petitioner during its case in chief. The trial judge repeatedly and summarily ruled that petitioner's proffered testimony regarding his intent was "totally immaterial" and irrelevant (R.T. 373A-373B, 580-581, 586-587, 626-628, 630-631; A-8 — A-11, A-13 — A-16). These rulings

contradict the law as established by this Court, and as followed by the Fourth Circuit in an identical case.

Conviction for a violation of the Military Selective Service Act requires that the government prove actual knowledge of one's legal obligation and a specific intent to violate that law by failing or refusing to register. *United States v. Klotz*, 500 F.2d 580 (8th Cir., 1974); *United States v. Neilson*, 471 F.2d 905 (9th Cir., 1973), and *see Lambert v. California*, 355 U.S. 225 (1957) and *United States v. Murdock*, 290 U.S. 389 (1933). Where specific intent is an element of the offense the jury must decide the existence or non-existence of specific intent as a question of fact. *Sandstrom v. Montana*, 442 U.S. 510 (1978); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Morissette v. United States*, 342 U.S. 246 (1952). In such a case, regardless of the admission of evidence from which inferences of the defendant's state of mind might be drawn, the defendant is himself entitled to state directly what his intention was and what the motives were which induced him to act. In *Crawford v. United States*, 212 U.S. 183, 197-205 (1909), this Court unanimously reversed a conviction for conspiracy to defraud the United States, where the prosecution was permitted to introduce evidence bearing on the defendant's state of mind, but explanatory and responsive evidence from the defendant was ruled out.

> There may have been testimony some time during the trial, from which inferences might possibly have been drawn as to the motive or intent with which [the defendant acted] but, instead of testimony from which some inferences might have been drawn, the defendant was entitled to state directly on oath to the jury what that intention was, and what were the motives which induced him to [act].

Id., at 205.

The decision below directly conflicts with an indistinguishable Fourth Circuit opinion in *United States v. Bowen*, 421 F.2d 193 (4th Cir., 1970), where the Court of Appeals applied this Court's ruling in the Selective Service context, stating:

> Although the record is replete with evidence of wilfullness on the part of the defendant in failing to report for induction, we think that he should not have been deprived of

> the opportunity to deny it, or to offer any possible explanations of his conduct. In short, while the right to answer the questions posed to him may have availed him little, he should not have been denied that right; and his conviction can thus not be allowed to stand.

Id., at 197.

Notwithstanding that the record in *Bowen* was replete with evidence of wilfullness, the refusal to allow the defendant to explain his reasons, as bearing on his state of mind, constituted prejudicial error as a deprivation of his right to defend himself.

The trial court's rulings are not properly subject to casual review on an abuse of discretion standard as suggested below. A federal defendant has a clear statutory right under 18 U.S.C. Section 3481 to testify in his own behalf. This right has strong constitutional undertones. *United States v. Grayson*, 438 U.S. 41, 54 (1978). The right of a defendant under the Sixth and Fourteenth Amendments "to make his defense," *Faretta v. California*, 422 U.S. 806, 819 (1975), encompasses the right to testify in his own behalf. See *Ferguson v. Georgia*, 365 U.S. 570, 602 (1961) (Clark, J., concurring). Thus the interest of petitioner in testifying in his own behalf as to motive and reasons appears to be of constitutional dimension.

The rulings of the trial judge excluding petitioner's testimony to his state of mind denied petitioner a fair trial on the only disputed issue in the case, the criminality *vel non* of his intent in failing to register.

Certiorari should be granted to reinforce and explicate the *Crawford* rule and to resolve the Ninth Circuit's conflict with the Fourth Circuit on this important question.

3. The Ninth Circuit's Decision Upholding the Conviction on Continuing Offense Grounds Directly Conflicts with this Court's Precedents.

Under Presidential Proclamation 4771 of July 2, 1980 (A-19) petitioner was called on to register between July 21 and July 26, 1980. In upholding the indictment, which charged petitioner with an offense "beginning on or about July 27, 1980, and continuing up to the date of

the return of this indictment'' (A-4) the District Court ruled that non-registration is a continuing offense. The jury found petitioner guilty on the basis of the indictment and the Court's instructions that failure to register is a continuing offense. Accordingly, it is impossible to tell whether the jury believed that he had criminal intent during the six-day proclamation period. The Ninth Circuit upheld the conviction without confronting the issue raised by the wording of the indictment and jury charge.

These rulings directly conflict with the decisions of this Court. *Toussie v. United States*, 397 U.S. 112 (1970), held that failure to register is not a continuing offense. *Chiarella v. United States*, 445 U.S. 222 (1980), held that a jury's general verdict cannot be upheld where two theories have been offered in the charge and one of them is invalid.

(a) The District Court's Ruling Construing Nonregistration as a "Continuing Offense" Contradicts this Court's 1970 Interpretation of the Same Offense.

In *Toussie v. United States*, 397 U.S. 112 (1970), this Court held that failure to register with Selective Service is not a continuing offense. This Court noted that "the doctrine of continuing offense should be applied in only limited circumstances . . ." (*id.*, at 115) and defined the test of whether an offense should be construed as a continuing one:

> [S]uch a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

Toussie, 397 U.S. at 115. This Court found no such explicit language in the Act, and concluded, "There is also nothing inherent in the act of registration which makes failure to do so a continuing crime." *Id.*, at 122.

Under the facts of *Toussie*, the consequence of this ruling was a dismissal on statute of limitations grounds, as Toussie had been indicted more than five years after the end of the registration period defined in the applicable proclamation.

Dissatisfied with the result in *Toussie*, Congress could have amended the Act to create a continuing offense of failure to register. It did not. Instead, Congress amended Section 462(d) to extend the statute of limitations for the crime of failing to register to a maximum of 13 years (A-19). As amended, that section now provides that a nonregistrant may be prosecuted for up to five years after his 26th birthday, "or within five years next after the last day before such person does perform his duty to register, whichever shall first occur."

The District Court relied on the reference in the statute to "duty to register" in concluding that the amendment mandated that nonregistration be treated as a continuing offense (A-17).

This is plainly wrong. The rationale upon which the District Court based its ruling was rejected by this Court in *Toussie*. Prior to *Toussie*, the Selective Service had promulgated a regulation, since rescinded, imposing a continuing *duty* to register. This Court, discussing that regulation, said: "[N]either the regulation nor the Act itself requires that failure to register be treated as" a continuing offense. *Toussie*, 397 U.S. at 121, n. 17.[4]

The only provision for registering after the times defined in Presidential Proclamation 4771 appears in Section 1-109 of that proclamation. Section 1-109 requires that an individual unable to present himself for registration at the prescribed times due to some condition beyond his control, must register within 30 days after the termination of the condition beyond his control (A-20). This provision would be unnecessary if nonregistration were a continuing offense enforceable by criminal sanctions. This Court in *Toussie* noted an analogous provision in 50 U.S.C. App. Section 456(k), which provides that individuals who are excepted from registration requirements must register upon the expiration of the exception. *Toussie*, 397 U.S. at 119, n. 12.

If nonregistration were a continuing offense, rendering tardy registration both a legal obligation and subject to criminal sanction, a serious

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[4] The purposes of Congress's post-*Toussie* amendments to 50 U.S.C. App. Section 462(d) were two: to provide an incentive for tardy registrations even when a legal violation had occurred, and to render 26-year-olds who had never registered liable for prosecution for up to five more years. Neither of these purposes implies that Congress intended to make nonregistration a continuing offense.

Fifth Amendment self-incrimination problem would also be posed. Such a requirement that a nonregistrant register late would amount to compulsion that the nonregistrant incriminate himself, in violation of the Fifth Amendment privilege, by admitting that he had not previously registered. *Leary v. United States*, 395 U.S. 6 (1969), *Marchetti v. United States*, 390 U.S. 39 (1968).[5]

The United States Court of Appeals for the Eighth Circuit divided five-to-four on the question of whether nonregistration is a continuing offense. *United States v. Eklund*, No. 82-2505 (8th Cir., 1984) (en banc).

Certiorari should be granted to enforce the settled construction of this criminal statute as established in *Toussie v. United States*, 397 U.S. 112 (1970).

(b) The Ninth Circuit's Ruling that It Need Not Reach the Continuing Offense Issue Conflicts with this Court's Rule Requiring Reversal When the Jury Has Been Offered an Invalid Theory on Which to Base a General Verdict.

The indictment in this case charges petitioner with failure to register for the draft over a period of time beginning "on or about July 27, 1980." Even if this language permits one to say that the indictment refers at all to the proclamation period, which ended on July 26, it certainly also includes time during which Presidential Proclamation 4771 did not specify a duty to register for persons born in 1960. At the conclusion of trial, and in conflict with this Court's decision in *Toussie*, the judge instructed the jury that "Section 462(d) of the Military Selective Service Act imposes on eligible individuals a continuing duty to register until they reach age 26. Consequently, failure to register is a continuing offense." (A-15) The court also charged that:

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[5] The absence from the Act of notice that failure to register is an offense continuing beyond the time specified in the Presidential Proclamation makes the statute unconstitutionally vague if petitioner is to be punished for conduct outside the week of July 21 to July 26, 1980. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Moreover, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978); *see* also *Bifulco v. United States*, 447 U.S. 381 (1980).

> [T]o constitute the crime charged in the indictment there must be a joint operation of two essential elements, an act forbidden by law and an intent to do that act which was required by law, and an intent to fail to act. (A-17)

Thus the jury was instructed to convict even if it found that the petitioner's conduct was not accompanied by criminal wilfullness until well after July 26, 1980.

The jury returned a general verdict of guilty.

The Ninth Circuit did not reach the question of whether failure to register is a continuing offense because "the language of the indictment . . . encompasses at least the latter portion of the week of July 21-26, appellant's registration period." (A-0) The indictment and jury instructions, however, also encompass a period of time outside petitioner's draft registration period and during which he had no legal duty to register. It is therefore quite possible that the jury found petitioner guilty based on his conduct during a period when he could not have violated the law. The law of this Court requires reversal under these circumstances, where it is "impossible to ascertain whether the defendant has been punished for noncriminal conduct." *Chiarella v. United States*, 445 U.S. 222, 237, n. 21 (1980). See also *Sandstrom v. Montana*, 442 U.S. 510, 525 (1978).

To let petitioner's conviction stand would be to sanction the lower court's departure from the accepted safeguards of due process in the course of judicial proceedings.

CONCLUSION

For each of the foregoing reasons, petitioner BENJAMIN H. SASWAY prays that this Court grant his petition for a writ of certiorari to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: June 20, 1984

Respectfully submitted,

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APPENDIX

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FEB 2 1984
PHILLIP B. WINBERRY
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BENJAMIN H. SASWAY, Defendant-Appellant.	No. 82-1585 C.R. No. 82-504-GT **MEMORANDUM***

Appeal from the United States District Court
for the Southern District of California
Hon. Gordon Thompson, Jr., U.S. District Judge, Presiding
Argued July 6, 1983
Submission Deferred July 6, 1983
Resubmitted November 18, 1983

Before: ALARCON and NORRIS, Circuit Judges, and PRICE,** District Judge.

Appellant's contentions that the government's "passive" draft registration enforcement policy is unconstitutional and that Presidential Proclamation 4771 and the registration regulations are invalid are controlled by *United States v. Wayte*, 710 F.2d 1385 (9th Cir. 1983). The district court's refusal to permit appellant to testify as to his motives and reasons for failing to register was within the court's discretion since such testimony was not relevant to the question of guilt or innocence. We need not reach the question whether failure to register is a continuing offense, because the language of the indictment, charging that appellant knowingly and willfully failed to register "[b]eginning on or about July 27, 1980 . . .," encompass at least the latter portion of the week of July

** The Honorable Edward Dean Price, United States District Judge for the Northern District of California, sitting by designation.

21-26, appellant's registration period. Appellant's argument that conscription is unconstitutional has been rejected by the Supreme Court. *Arver v. United States*, 245 U.S. 366 (1917). Appellant's contention that preindictment delay requires reversal is without merit. Section 462(c) of the MSSA applies only when the Director of Selective Service requests an expeditious prosecution. *See United States v. Saltzman*, 548 F.2d 395, 399 n.5 (2d Cir. 1976). Appellant claims that preindictment delay violated the fifth amendment, but he fails to allege the requisite "actual prejudice" and "government culpability." *See United States v. Farris*, 614 F.2d 634, 640 (9th Cir. 1979). The trial court's discovery rulings were not an abuse of discretion, nor did the court's rejection of appellant's proposed voir dire questions and jury instructions constitute error. The judgment of conviction is

AFFIRMED.

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21, of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

FILED FEB 9 1984 PHILLIP B. WINBERRY CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BENJAMIN H. SASWAY, Defendant-Appellant.	No. 82-1585 C.R. No. 82-504-GT ORDER

NORRIS, J., concurring in the judgment:

I reluctantly concur in the majority's disposition of Mr. Sasway's appeal filed February 2, 1984. As a regular three-judge panel, we are bound to follow *United States v. Wayte*, 710 F.2d 1385 (9th Cir. 1983), which upheld the constitutionality of the government's so-called "passive" draft registration enforcement policy. In my opinion, *Wayte* was wrongly decided. I agree with Judge Schroeder in her incisive dissent in *Wayte* and with the Sixth Circuit in *United States v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983), that the government's policy of prosecuting only non-registrants who speak out against the draft constitutes selective prosecution in violation of the first amendment of the Constitution. Because of the conflict in the circuits created by *Wayte* and *Schmucker* on a constitutional question of exceptional importance, *Wayte* should be reconsidered by an en banc panel of this court and, in my view, overruled. *See* Fed. R. App. P. 35.

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SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

May 1982 Grand Jury

UNITED STATES OF AMERICA,	Criminal Case No. 820504-GT
Plaintiff,	**INDICTMENT**
v.	Title 50, U.S.C. App., Secs. 453 & 462(a) - Selective Service Act, Failure to Register
BENJAMIN N. SASWAY,	
Defendant.	

The grand jury charges:

Beginning on or about July 27, 1980, and continuing up to the date of the return of this indictment, within the Southern District of California, defendant BENJAMIN H. SASWAY, a male person required to present himself for and submit to registration pursuant to the Military Selective Service Act, rules and regulations duly made pursuant thereto and Presidential Proclamation 4771 of July 2, 1980, did knowingly and wilfully fail, evade and refuse to present himself for and submit to registration; in violation of Title 50, United States Code Appendix, Sections 453 and 462(a).

DATED: June 30, 1982.

A TRUE BILL:

Rowley E. Gilling Lam

Foreman

PETER K. NUNEZ
United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BENJAMIN H. SASWAY, Defendant.	Cr. Case No. 82-0504-GT ORDER

This case came on for hearing on defendant Benjamin Sasway's motion to dismiss the indictment on the ground of selective prosecution. A full evidentiary hearing was conducted on August 17 and 18, 1982, at which time the Government presented the testimony of Selective Service's Edward A. Frankle, Special Assistant to the Director for Compliance; David J. Kline, Senior Legal Advisor, General Litigation and Legal Advice Section, Criminal Division, United States Department of Justice; Peter K. Nunez, United States Attorney for the Southern District of California, San Diego; Douglas G. Hendricks, Chief, Criminal Complaints Section, U.S. Attorney's Office, San Diego, California; Robert D. Rose, Chief, Criminal Division, U.S. Attorney's Office, San Diego; and Claude Shelby Durr, Special Agent, Federal Bureau of Investigation, San Diego Division. The court orally announced its decision to deny defendant Sasway's motion to dismiss the indictment on the ground of selective prosecution and articulated the reasons for its decision.

In order to sustain an allegation of discriminatory or selective prosecution, a defendant must show: 1) that others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted; and 2) that his selection was based on impermissible grounds such as race, religion, or his exercise of his First Amendment right to free speech. *United States v. Wilson*, 639 F.2d 500, 503 (9th Cir. 1981); *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976).

The court finds that defendant Sasway was not individually singled out for prosecution as a result of his exercise of his First Amendment right to free speech. The court finds further that the passive enforcement system

does not in itself result in the selective prosecution of vocal resisters. Under the passive enforcement system, individuals other than vocal resisters are subject to prosecution. The court finds that the Government is not singling out vocal protesters for prosecution but is prosecuting and would prosecute any nonregistrants that come to its attention either by self-reporting or by third party reports.

An analogy to the present case is provided by the tax protester cases. In such cases, with many thousands of potential investigations and only limited enforcement resources, only a very small number can be prosecuted. As the Ninth Circuit noted in *Wilson*: "It is also not surprising that tax protesters, who seek by various attention-getting devices to attract enforcement attention to their cases, succeed. . . . Unless one can show that the tax laws are deployed against protesters in retailiation [*sic*] for the exercise of their rights, a selective prosecution argument will fail." 630 F.2d at 505.j

Unlike the situation presented in *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972), the court finds no evidence that the Selective Service laws have been deployed against vocal protesters in retaliation for the exercise of their First Amendment rights. The court finds that this prosecution is in no way based upon the Government's singling out defendant Sasway, either individually or as a member of a class of vocal protesters, for reasons such as his race, religion, or in order to deter him from exercising his constitutional rights. The court also finds that the Department of Justice chose neither defendant Sasway nor the Southern District of California for the first indictment.

After consideration of the motion and memoranda of points and authorities, the exhibits, the evidence, the questions raised at argument, for the reasons set forth orally at the hearing, and for the reasons set forth above, the court hereby denies the motion to dismiss the indictment on the ground of selective prosecution.

IT IS SO ORDERED.

Dated: August 19, 1982

GORDON THOMPSON, JR., Judge
United States District Court

RULING OF THE DISTRICT COURT (R.T. 296-298)

THE COURT: The ruling of the Court is tha [*sic*] the defendant Sasway was not singled out for prosecution as a result of any exercise of his First Amendment right of free speech. The fact that Mr. Kline recognized that selective prosecution would be made or could be made or might be made as a result of the passive selection system on which the Selective Service system and the Justice Department were about to embark does not necessarily mean that that is what occurred and as a matter of fact, it did not occur and it has shown that it did not occur. The fact of the matter is that it has not been demonstrated over the past day and a half that the Government nor any agent of the Government has engaged in any type of selective prosecution.

As for the argument which would violate any First Amendment right or any other exercise of a right upon which selective prosecution should be based. Neither in my judgment is the system as designed productive of selective prosecution which is prohibited. You must understand that there is a difference between prosecution of those who hve turned themselves in and/or those who have been turned in as opposed to the so-called active seeking out of those who have not done either. That apparently from the hearings that we have conducted over the past day and a half is to come.

Clearly the evidence shows that none of these people from Mr. Frankel to Mr. Kline to Mr. Nunez to Mr. Hendricks to Mr. Rose were aware of Mr. Sasway's activities, vocal and otherwise, and I think even had they been, that would not have created a selective prosecution system. There were five, I guess, in total sent here. Some eventually ended up other places. The fact of the matter is Mr. Sasway just happened to be the first one that was indicted and there is no evidence whatsoever before this Court that the prosecution was other than as designated by the Department of Justice and the Selective Service system for the other 105 or 183 and so on and so forth. How many men they are going to eventually end up prosecuting.

The basis of this prosecution is not in any way impermissible nor is the passive system of selecting those to prosecute in its current form impermissible, so the motion is denied.

PETITIONER'S TESTIMONY (R.T. 626-628)

Q. Now, the Government attorney put on the TV excerpts and you saw those, right?

A. Yes, sir.

Q. And in one of those excerpts that they put on, we saw your picture. You were talking about you used the expression to go "CO." Wht did you mean by that?

A. I was referring to conscientious objector status. That is the status which--

MRS. ANNEN: Objection, your Honor. I believe he has already answered the question.

THE COURT: Sustained. He has answered it.

BY MR. BUMER:

Q. And as a matter of fact, you were rejecting that as an alternative, right?

A. Yes, sir, I was.

Q. Now, you also talked about moving to Canada in that film, that TV clip?

A. Yes.

Q. Now, you were talking about that as a possible means of evading the registration and the draft, weren't you?

A. Yes, sir.

Q. And you were rejecting that, right?

A. Exactly.

Q. You also mentioned a third thing and that was to register and I assume make the problem go away, right?

A. I think that is an accurate reflection of my views.

Q. And you also rejected that?

A. Exactly, yes.

PETITIONER'S TESTIMONY (R.T. 630-631)

Q. Why did you reject these alternatives?

MRS. ANNEN: Objection. Irrelevant.

THE COURT: Sustained. These alternatives, that calls for compound answer, Counsel. Rephrase your question.

MR. BUMER: Thank you, your Honor.

BY MR. BUMER:

Q. Why did you reject the idea of going to Canada?

MRS. ANNEN: Objection. Irrelevant.

THE COURT: Sustained.

BY MR. BUMER:

Q. Why did you reject the idea of claiming conscientious objector status?

MRS. ANNEN: Same objection.

THE COURT: Sustained.

BY MR. BUMER:

Q. Why did you reject the alternative of registering?

MRS. ANNEN: Same objection.

THE COURT: Sustained.

Q. While you were considering this possibility of nonregistration, did you consider the possibility of simply not registering and not saying anything about it?

A. Only briefly.

Q. Was that brought up by somebody else?

A. People have suggested that that might be another alternative to the action I decided upon all along.

Q. That alternative would be just to stay quiet about it and hope that you never got found out, right?

A. That was the suggestion, yes.

Q. And you rejected that?

A. Absolutely, yes, sir.

Q. Why?

MRS. ANNEN: Objection, your Honor. Irrelevant.

MR. ROSE: Objection.

THE COURT: Sustained.

BY MR. BUMER:

Q. Ben, why did you take this step of not registering for the draft?

MRS. ANNEN: Objection. Irrelevant, your Honor.

THE COURT: Sustained.

MR. BUMER: Your Honor, it's already in.

MR. ROSE: Your Honor, there has been a ruling on this already which Mr. Bumer is familiar with.

THE COURT: That's correct. Objection sustained.

MR. BUMER: Could I have just a moment, your Honor?

THE COURT: Sure.

BY MR. BUMER:

Q. Ben, you would like to be able to tell the jury why you made this decision, wouldn't you?

A. Yes, sir.

MRS. ANNEN: Objection, your Honor. This has been ruled on before.

THE COURT: Yes. Objection sustained.

TESTIMONY OF DAVID J. KLINE (R.T. 172-173)

Q YOU BECAME CONCERNED ABOUT THE ISSUE OF SELECTIVE PROSECUTION ALMOST IMMEDIATELY AFTER YOUR ASSIGNMENT, DIDN'T YOU?

A I THINK THAT WOULD BE A FAIR STATEMENT, YES, SIR.

Q AND SPECIFICALLY, WHEN YOU HEARD THAT THEY WERE RELYING ON WHAT THEY CALLED THE PASSIVE ENFORCEMENT OR PASSIVE REGISTRATION SYSTEM; RIGHT?

A YES, SIR.

TESTIMONY OF DAVID J. KLINE (R.T. 118-119)

A YES, I DO. THIS IS THE MEMORANDUM THAT I DRAFTED IN RESPONSE TO ESSENTIALLY D. LOWELL JENSEN, THE ASSISTANT ATTORNEY GENERAL, AT HIS REQUEST FOR OUR VIEWS ON THE PROSECUTIVE POLICY NOW THAT THE GRACE PERIOD HAD ENDED.

I BEGAN THE MEMORANDUM, ESSENTIALLY TALKING ABOUT WHAT WE KNEW ABOUT THE SERVICE'S ACTIVE

COMPLIANCE PROGRAM. WHAT WE KNEW AT THAT TIME WAS THAT THE MILITARY MANPOWER TASK FORCE ENDORCED [*sic*] SERVICES PLANNED TO USE SOCIAL SECURITY NUMBERS, BUT ED FRANKLE'S BEST ESTIMATE WAS THAT WE WOULD NOT HAVE AN ACTIVE PROGRAM ACTUALLY BEING ABLE TO REFER US NAMES UNTIL EARLY 1983.

NOW, HERE IS ESSENTIALLY THE PROBLEM THAT WAS POSED TO US. WE HAVE THIS ENFORCEMENT POLICY THAT GOES OUT AND SEEKS OUT PEOPLE, BUT IT WOULDN'T BE READY TO TURN OVER NAMES UNTIL EARLY 1983. IT'S BEEN ALMOST TWO YEARS SINCE REGISTRATION BEGAN. WE KNOW THERE ARE APPROXIMATELY HALF A MILLION NON-REGISTRANTS, AND WE KNW [*sic*] THERE WAS A GRACE PERIOD AND THAT THE GRACE PERIOD ENDED.

WHAT DO WE DO? BALANCING ESSENTIALLY A NEED TO CREATE A CREDIBLE DETERRENT VERSUS PREFERENTIAL POLICY OF WAITING UNTIL THERE'S AN ACTIVE ENFORCEMENT SCHEME, IN OUR VIEW TIME ESSENTIALLY REQUIRED THAT WE GO ESSENTIALLY REASONABLY AS SOON AS POSSIBLE IN ORDER TO CREATE A CREDIBLE DETERRENT TO NON-REGISTRATION WITH THE SELECTIVE SERVICE SYSTEM.

WHAT THAT MEANT WAS WE DECIDED TO GO WITH THE PASSIVE ENFORCEMENT SCHEME, TO GO WITH THE PEOPLE THAT HAD EITHER BROUGHT THEMSELVES TO THE ATTENTION OF THE SERVICE OR BE BROUGHT TO THE SERVICE'S ATTENTION BY SOMEONE ELSE.

THE QUESTION THEN PRESENTED ITSELF, SHOULD WE ACCEPT MORE PEOPLE FROM THE PASSIVE ENFORCEMENT SCHEME? THE ANSWER IS YES.

RULINGS OF THE DISTRICT COURT (R.T. 9)

THE COURT: THIS IS THE TIME FOR THE HEARING ON THE MOTIONS IN THIS CASE. THE FIRST MOTION THE COURT WILL HEAR IS THE SELECTIVE PROSECUTION ISSUE. THE COURT HAS FOUND FROM THE AFFIDAVIT PRESENTED BY THE DEFENSE THAT IT BECOMES NECESSARY TO HAVE A HEARING ON THAT ISSUE. THE DEFENSE HAS CARRIED THE BURDEN OF SECURING THE HEARING, AND THIS IS THE TIME AND PLACE FOR THE HEARING ON THAT ISSUE, AS WELL AS ALL OTHER MOTIONS FILED BY THE DEFENSE. COUNSEL FOR THE GOVERNMENT WILL PROCEED WITH THEIR SHOWING.

RULINGS OF THE DISTRICT COURT (R.T. 373A-373B)

(AT THE BENCH)

THE COURT: BEFORE WE GET STARTED, I'M GOING TO TELL YOU SOMETHING. WE DON'T TRY CASES IN THIS COURT AT SIDE BAR. YOU ASK FOR A SIDE BAR, IT BETTER BE FOR A GOOD REASON; OTHERWISE, IT'S GOING TO BE NO. YOU CAN HANDLE IT AT A RECESS. I'M NOT RUNNING BACK AND FORTH UP HERE.

MR. ROSE: I TOLD MR. MOHLER I HAVE A MOTION IN LIMINE.

THE COURT: A MOTION IN LIMINE DOESN'T EXIST. THERE'S NO SUCH THING.

NOW, WHAT DO YOU WANT? PROVE IT TO ME. WHERE DO YOU FIND A MOTION IN LIMINE?

MR. ROSE: CAN't THINK OF THE NUMBER OF CASES THEY'VE BEEN HEARD IN. THERE'S ALWAYS AN ALTERNATIVE TO BOTH SIDES OF THE LAW.

THE MOTION, ON THE RECORD, YOUR HONOR, IS ONE THAT WAS ADDRESSED IN CHAMBERS BEFORE WE BEGAN TODAY. THAT WAS THE INDICATION THAT PLEADINGS

WERE FILED BY THE DEFENDANT INCLUDED PROPOSED JURY INSTRUCTIONS, AND INDICATED EVIDENCE MIGHT BE SOUGHT TO BE INTRODUCED ON DEFENDANT'S BEHALF INVOLVING SINCERITY, PURITY OF MOTIVE, THE FACT THERE WAS NO EVIL MOTIVE, MORAL CONVICTIONS AND REASONS FOR NOT COMPLYING WITH THE LAW, AS WELL AS GROUNDS BY WHICH HE MIGHT CONSTITUTE A CONSCIENTIOUS OBJECTOR. I'D ASK FOR A RULING BEFORE MR. BUMER MAKES HIS OPENING STATEMENT.

THE COURT: I ALREADY RULED. IT'S TOTALLY IMMATERIAL.

RULINGS OF THE DISTRICT COURT (R.T. 409-411)

Q DO YOU REMEMBER WHEN THE GOLDBERG VERSUS ROSTKER DECISION CAME DOWN IN PHILADELPHIA?

MS. ANNEN: OBJECTION TO THE RELEVANCE OF THIS LINE OF QUESTIONING.

MR. BUMER: YOUR HONOR, MAY I RESPOND TO THAT?

THE COURT: COME ON UP HERE.

(AT THE BENCH):

THE COURT: YOUR OFFER OF PROOF?

MR. BUMER: HE'S TESTIFIED THAT THEY USED THIS MEDIA PUBLICATION SYSTEM, AND WHAT I INTEND TO SHOW THROUGH HIM IS WHEN *GOLDBERG* CAME DOWN, THE MEDIA WAS PUBLISHING INFORMATION TO THE EFFECT THAT REGISTRATION WAS VOLUNTARY ONLY, AND THAT WAS THE INFORMATION THAT WAS GOING OUT.

I'VE GOT A CLIPPING HERE FROM THE FRONT PAGE OF THE NEW YORK TIMES.

MS. ANNEN: THERE WAS ONE DECISION OUT OF PENNSYLVANIA, A THREE-JUDGE COURT FOR ONE DAY WHERE

THEY DECLARED THE PROGRAM UNCONSTITUTIONAL BASED ON SEX DISCRIMINATION.

THE NEXT DAY THE SUPREME COURT STATED IN THAT DISTRICT COURT DECISION BY THE COURT ON REGISTRATION, SAID NOBODY HAD TO REGISTER. THE NEXT DAY THE SUPREME COURT, JUSTICE BRENNAN, CAME IN AND OVERTURNED THE STAY AND ORDERED REGISTRATION CONTINUE. THE CASE WENT UP ON ANNEAL [*sic*] LATER ON JUNE 25TH, AND THE SUPREME COURT EVENTUALLY DECLARED THE REGISTRATION PROGRAM CONSTITUTIONAL. THAT STAY --

MR. BUMER: LET ME STRAIGHTEN THIS OUT, IF I MAY.

THE COURT: LET HER FINISH.

MS. ANNEN: THE SUPREME COURT HEARD THE SEX DISCRIMINATION CHALLENGE AND DECLARED THE REGISTRATION PROGRAM CONSTITUTIONAL. THEY DID NOT HAVE TO REQUIRE WOMEN TO REGISTER. IT WAS SUFFICIENT THEY HAD MALES, AND THAT STAY WAS IN EFFECT ONE DAY.

UNLESS HIS CLIENT SPECIFICALLY RELIED ON THAT STAY AND KNEW ABOUT IT, IT'S IRRELEVANT TO THIS CASE. HE IS SIMPLY TRYING TO INTRODUCE THIS TO CREATE CONFUSION.

THE COURT: ALL RIGHT.

MR. BUMER: ON FRIDAY A THREE-JUDGE COURT IN PHILADELPHIA RULED THE PROGRAM UNCONSTITUTIONAL.

THE COURT: WHAT FRIDAY?

MR. BUMER: FRIDAY, JULY 18TH, JUST BEFORE REGISTRATION BEGAN. ON SATURDAY JUSTICE BRENNAN GRANTED A STAY, AND EVENTUALLY THE SUPREME COURT REVERSED, A YEAR LATER.

MY POINT IS ON SATURDAY, THE DAY FOLLOWING, SATURDAY THE 19TH, THE MEDIA -- MANY ELEMENTS OF THE MEDIA, INCLUDING THE NEW YORK TIMES, PUBLISHED INFORMATION TO THE EFFECT THAT REGISTRATION WAS VOLUNTARY ONLY. THAT WAS SYNDICATED TO THE NEW YORK TIMES SYNDICATED SERVICE, AND THAT WAS PART OF THE MEDIA PUBLICITY THAT WENT OUT THAT HE HAS TESTIFIED ABOUT. HE HASN'T TESTIFIED ABOUT THAT SPECIFICALLY, BUT HE'S TESTIFYING ABOUT THE MEDIA PUBLICITY.

THE COURT: THE OBJECTION IS SUSTAINED. IT'S TOTALLY IMMATERIAL. THERE'S NO ISSUE WHETHER HE KNEW ABOUT IT OR NOT. THE LETTER SPECIFICALLY INDICATES THAT HE DIDN'T, SO THE OBJECTION IS SUSTAINED. IT'S IRRELEVANT.

RULINGS OF THE DISTRICT COURT (R.T. 586-587)

THE COURT: Oh, no, no, no. There is a very strong-- the case of United States vs. Pomponie 429 U.S. 10 which was followed in Erickson vs. United States which is a 1982 case out of the Tenth Circuit-- these are tax cases but they make the law very plain-- that a defendant need not be shown to have acted with bad purpose or evil motive. It follows that the demonstration of a good purpose is not a defense. If it is shown that the defendant intentionally violated his known and legal duty to file a tax return, his reason for doing so is irrelevant.

I rule, based upon the Pomponie case and this case, that that is an accurate statement of the law so his failure to register is irrelevant. The reasons for his failure to register is irrelevant. The issue is did he register. Okay?

RULINGS OF THE DISTRICT COURT (R.T. 580-581)

THE COURT: Well, I tried to explain to you, Mr. Bumer, that his reasons for not registering, if they are based upon what is contained in those film clips and what is contained in the letter, are not defenses to this case. That's where you're going to pull your objection and if you pull your objection, I am going to have to sustain it and it's going to cut

you and your client off. I just want you to know that in advance. Those statements that came in via the tapes were statements of admissions against interest and had to come in in the way they did, as I explained it to you, because to come in simply nakedly, the jury would not even get to see the tape. It would be here today and gone yesterday so that was the purpose in introducing it. You must take the evidence for the purpose for which it is introduced.

Now, if your're saying by introducing those other comments that they have opened the door, if that be the case, that is not so.

JURY INSTRUCTIONS

CONTINUING OFFENSE:

IN ADDITION, SECTION 462(D) OF THE MILITARY SELECTIVE SERVICE ACT IMPOSES ON ELIGIBLE INDIVIDUALS A CONTINUING DUTY TO REGISTER UNTIL THEY REACH AGE 26. CONSEQUENTLY, FAILURE TO REGISTER IS A CONTINUING OFFENSE.

JOINT OPERATION OF ACT AND INTENT:

NOW, TO CONSTITUTE THE CRIME CHARGED IN THE INDICTMENT, THERE MUST BE A JOINT OPERATION OF TWO ESSENTIAL ELEMENTS, AN ACT FORBIDDEN BY LAW AND AN INTENT TO DO THAT ACT WHICH WAS REQUIRED BY LAW, AND AN INTENT TO FAIL TO ACT.

50 U.S.C. App. § 453

§ 453. Registration

(a) Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101) [8 USCS § 1101], for so long as he continues to maintain a lawful nonimmigrant status in the United States.

50 U.S.C. App. § 462.

§ 462. Offenses and penalties

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title or any person or persons who shall knowingly hinder or

interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [enacted June 24, 1948]. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

* * * *

(d) No person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title [50 USCS Appx. § 453] unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years next after the last day before such person does perform his duty to register, whichever shall first occur.

Proclamation 4771—Registration under the Military Selective Service Act

SOURCE: The provisions of Proclamation 4771 of July 2, 1980, appear at 45 FR 45247, 3 CFR, 1980 Comp., p. 82, unless otherwise noted.

Section 3 of the Military Selective Service Act, as amended (50 U.S.C. App. 453), provides that male citizens of the United States and other male persons residing in the United States who are between the ages of 18 and 26, except those exempted by Sections 3 and 6(a) of the Military Selective Service Act, must present themselves for registration at such time or times and place or places, and in such manner as determined by

the President. Section 6(k) provides that such exceptions shall not continue after the cause for the exemption ceases to exist.

The Congress of the United states has made available the funds (H.J. Res. 521, approved by me on June 27, 1980), which are needed to initiate this registration, beginning with those born on or after January 1, 1960.

NOW, THEREFORE, I, JIMMY CARTER, President of the United States of America, by the authority vested in me by the Military Selective Service Act, as amended (50 U.S.C. App. 451 *et seq.*), do hereby proclaim as follows:

1-1. *Persons to be Registered and Days of Registration.*

1-101. Male citizens of the United States and other males residing in the United States, unless exempted by the Military Selective Service Act, as amended, who were born on or after January 1, 1960, and who have attained their eighteenth birthday, shall present themselves for registration in the manner and at the time and places as hereinafter provided.

1-102. Persons born in calendar year 1960 shall present themselves for registration on any of the six days beginning Monday, July 21, 1980.

1-103. Persons born in calendar year 1961 shall present themselves for registration on any of the six days beginning Monday, July 28, 1980.

1-104. Persons born in calendar year 1962 shall present themselves for registration on any of the six days beginning Monday, January 5, 1981.

1-105. Persons born on or after January 1, 1963, shall present themselves for registration on the day they attain the 18th anniversary of their birth or on any day within the period of 60 days beginning 30 days before such date; however, in no event shall such persons present themselves for registration prior to January 5, 1981.

1-106. Aliens who would be required to present themselves for registration pursuant to Sections 1-101 to 1-105, but who are in processing centers on the dates fixed for registration, shall present themselves for registration within 30 days after their release from such centers.

1-107. Aliens and noncitizen nationals of the United States who reside in the United States, but who are absent from the United States on the days fixed for their registration, shall present themselves for registration within 30 days after their return to the United States.

1-108. Aliens and noncitizen nationals of the United States who, on or after July 1, 1980, come into and reside in the United States shall present themselves for registration in accordance with Sections 1-101 to 1-105 or within 30 days after coming into the United States, whichever is later.

1-109. Persons who would have been required to present themselves for registration pursuant to Sections 1-101 to 1-108 but for an exemption pursuant to Section 3 or 6(a) of the Military Selective Service Act, as amended, or but for some condition beyond their control such as

hospitalization or incarceration, shall present themselves for registration within 30 days after the cause for their exempt status ceases to exist or within 30 days after the termination of the condition which was beyond their control.

1-2. *Places and Times for Registration.*

1-201. Persons who are required to be registered and who are in the United States on any day fixed herein for their registration, shall present themselves for registration before a duly designated employee in any classified United States Post Office.

1-202. Citizens of the United States who are required to be registered and who are not in the United States on any of the days set aside for their registration, shall present themselves at a United States Embassy or Consulate for registration before a diplomatic or consular officer of the United States or before a registrar duly appointed by a diplomatic or consular officer of the United States.

1-203. The hours for registration in United States Post Offices shall be the business hours during the days of operation of the particular United States Post Office. The hours for registration in United States Embassies and Consulates shall be those prescribed by the United States Embassies and Consulates.

1-3. *Manner of Registration.*

1-301. Persons who are required to be registered shall comply with the registration procedures and other rules and regulations prescribed by the Director of Selective Service.

1-302. When reporting for registration each person shall present for inspection reasonable evidence of his identity. After registration, each person shall keep the Selective Service System informed of his current address.

Having proclaimed these requirements for registration, I urge everyone, including employers in the private and pubilc sectors, to cooperate with and assist those persons who are required to be registered in order to ensure a timely and complete registration. Also, I direct the heads of Executive agencies, when requested by the Director of Selective Service and to the extent permitted by law, to cooperate and assist in carrying out the purposes of this Proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of July, in the year of our Lord nineteen hundred and eighty, and of the Independence of the United States of America the two hundred and fourth.

FILED

APR 25 1984

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BENJAMIN H. SASWAY, Defendant-Appellant.	No. 82-1585 D.C. No. CR 82-504-GT **ORDER**

Before: ALARCON and NORRIS, Circuit Judges, and PRICE,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*The Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

No. 83-2098

In the Supreme Court of the United States

OCTOBER TERM, 1984

BENJAMIN H. SASWAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner was impermissibly selected for prosecution for violation of the Military Selective Service Act in retaliation for the exercise of his First Amendment rights.

2. Whether the district court properly excluded testimony concerning petitioner's motives for refusing to register with Selective Service.

3. Whether failure to register with Selective Service is a continuing offense.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 730 F.2d 771 (Table). The opinion of the district court (Pet. App. A5-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1984. A petition for rehearing was denied on April 25, 1984 (Pet. App. A22). The petition for a writ of certiorari was filed on June 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of violating 50 U.S.C. App. 453 and 462(a) by failing

to register with Selective Service as required by Presidential Proclamation No. 4771. He was sentenced to 30 months' imprisonment. The court of appeals affirmed.

1. On July 2, 1980, President Carter, acting pursuant to the Military Selective Service Act (50 U.S.C. App. 453), issued Presidential Proclamation No. 4771, 45 Fed. Reg. 45247 (1980). The Proclamation directed all males residing in the United States who were born during 1960 to register with the Selective Service System during the week of July 21, 1980, by filling out a registration card at a local post office. Petitioner, a college student born on December 9, 1960 (Tr. 373), was required to register but did not do so either during the week of July 21 or at any time thereafter. Instead, on July 24, 1980, he sent a letter to President Carter declaring that he was writing "as a symbolic statement of [his] opposition to all military conscription" and that he was not registering for the draft because of his belief that draft registration was "immoral and incompatible with [a] free society" (Tr. 387-388; GX 5).[1] Petitioner's letter was referred to Selective Service, which had received a number of other communications from people who stated that either they or persons known to them had not registered as required by law. In response to these reported violations, Selective Service established a "passive enforcement" system under which initial enforcement efforts would be directed at possible nonregistrants whose names had come to its attention (Tr. 16-19).[2]

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[1]In addition, on June 28 and July 1, 1980, petitioner appeared on a local television program and stated that he would not register for the draft (Tr. 561-562).

[2]The development and operation of the "passive enforcement" system is detailed (at 3-7, 12-13) in our brief in *Wayte* v. *United States*, cert. granted, No. 83-1292 (May 29, 1984), a copy of which is being sent to counsel for petitioner.

On June 17, 1981, Selective Service sent a letter by certified mail to each reported violator who it verified had not registered and for whom it had a mailing address. The letter explained the duty to register, stated that Selective Service had information that the person was required to register but had not done so, requested that he either comply with the law by filling out an enclosed registration card or explain why he was not subject to registration, and warned that a violation could result in criminal prosecution and specified penalties. Petitioner responded with a letter confirming that he had not registered and reiterating that he would not do so. Tr. 394-402, 541, 550; GX 8-10.

On July 20, 1981, Selective Service transmitted to the Department of Justice, for further investigation and possible prosecution, the names and files of 134 possible nonregistrants, including petitioner (Tr. 38-40). After screening out individuals who appeared not to be required to register, David J. Kline, the attorney in the Criminal Division of the Department responsible for supervising enforcement of the Selective Service laws, referred the remaining names to the Federal Bureau of Investigation for additional inquiry and to the United States Attorneys for the districts where the nonregistrants resided. Petitioner was among the people so referred. Tr. 107-108.

In order to encourage registration, the Department adopted a policy of leniency under which it would seek to obtain voluntary (albeit late) compliance by the nonregistrant as an alternative to prosecution. Pursuant to this so-called "beg" policy, the appropriate United States Attorney was required to notify identified nonregistrants by registered mail that, unless they registered within a specified time, prosecution would be considered. In addition, an FBI agent generally was sent to interview the person before prosecution was commenced. On October 7, 1981, pursuant to the "beg" policy, an Assistant United States Attorney

sent petitioner a letter urging him to register or face possible prosecution. Petitioner, however, failed to respond. Tr. 254-255, 425-427; GX 11.

On October 19, 1981, petitioner's attorney, Charles T. Bumer, informed the Assistant United States Attorney responsible for petitioner's case that petitioner was then out of the country. On that basis, Bumer requested that prosecution be deferred until he had the opportunity to talk with petitioner. During a second conversation in early December 1981, Bumer told the Assistant that he would notify him within a few days whether petitioner would register. Tr. 256, 427. Later that month, the Criminal Division instructed all United States Attorneys to suspend efforts to seek indictments against nonregistrants and to allow a grace period to provide them a final opportunity to register (Tr. 112-114, 402-403). On December 14, 1981, Bumer again contacted the Assistant United States Attorney and informed him that petitioner would not register in view of the suspension of prosecutions but that, if there was a change in the prosecution policy, petitioner would like another opportunity to register before he was prosecuted (Tr. 258).

The grace period continued until February 28, 1982. Thereafter, the Department instructed United States Attorneys to proceed with prosecutions if nonregistrants persisted in refusing to comply with the law (Tr. 122-126). Accordingly, on June 16, the Assistant United States Attorney telephoned Bumer to ascertain whether petitioner would register and to inform him that the government was proceeding with the prosecution. Bumer later returned the call and advised the Assistant that petitioner still would not register. Tr. 431-433. On June 30, 1982, an indictment was returned charging that petitioner, "[b]eginning on or about July 27, 1980 and continuing up to the date of the return of

the indictment, * * * did knowingly and wilfully fail, evade and refuse to present himself for and submit to registration" (Pet. App. A4).

2. a. Prior to trial, petitioner moved to dismiss the indictment on the ground of selective prosecution. In particular, he alleged that although more than 500,000 eligible young men had failed to register for the draft, only "vocal" opponents of the registration program were targeted for prosecution under the "passive enforcement" system. During an evidentiary hearing on the motion, the government presented the testimony of, inter alia, Criminal Division attorney Kline and Edward A. Frankle, who was responsible for the development and implementation of Selective Service's registration compliance program. Frankle testified that Selective Service had been attempting to establish an "active enforcement" program by using Social Security data to identify nonregistrants;[3] however, at the time of petitioner's referral to the Justice Department, the "passive enforcement" program was the only system for which Selective Service had the legal authority and resources to identify those who had failed to comply with the registration law. Frankle also explained that he had no knowledge of any anti-draft activities in which petitioner might have engaged and that he had referred petitioner's name to the Department because petitioner had confessed to violating the law. Tr. 41-44. Kline testified that the objective of the Criminal Division's prosecution policy was not to penalize "vocal" dissenters but to encourage compliance with the registration law. To that end, the Criminal Division determined that it would initially seek to obtain voluntary registration by each person whose name had been referred to it by Selective Service. If the nonregistrant complied, the investigation would be terminated. If, however, the nonregistrant

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[3]The development of an "active enforcement" program is described in our brief in *Wayte* (at 7-10, 13).

persisted in his refusal to register, he would be prosecuted. Kline emphasized that the purpose of the prosecution policy was to avoid possible problems and not to engage in any kind of selective prosecution. Tr. 101-104, 174, 185, 221, 247.

Following the hearing, the district court denied petitioner's motion to dismiss the indictment (Pet. App. A5-A6). It found no evidence either "that [petitioner] was * * * individually singled out for prosecution as a result of his exercise of his First Amendment right to free speech" or "that the Selective Service laws have been deployed against vocal protesters in retaliation for the exercise of their First Amendment rights" (*id.* at A5-A6). It also found that, under the "passive enforcement" system, "the Government is not singling out vocal protesters for prosecution but is prosecuting and would prosecute any nonregistrants that come to its attention either by self-reporting or by third party reports" (*id.* at A6).

b. Prior to trial and again at the beginning of the defense case, the district court excluded testimony proffered by petitioner concerning his motives and reasons for refusing to register with Selective Service (Tr. 373B, 580, 586). Testifying on his own behalf at trial, petitioner admitted that he had failed to register during the week of July 21, 1980, or at any time thereafter; that he had refused repeated requests by government officials to register; that he had written letters to the President and other government officials acknowledging his nonregistration; and that he had "intentionally and deliberately failed to register under the Selective Service program" and had made this "personal and moral [decision] * * * fully aware of the fact that legal consequences [would] flow from [the] failure to register" (Tr. 625, 636-638, 644, 649-650). Petitioner also testified that, although he was "not absolutely certain" concerning his obligation to register during the week of July 21 because

of a lower-court decision declaring the registration statute invalid on grounds of gender discrimination, he admitted that "[t]o the best of [his] knowledge * * * [he] felt that [he] did have to register that week" and knew that the court's ruling had been stayed by the Supreme Court prior to the inception of the registration period (Tr. 624-625, 632-633, 639). When Bumer attempted to elicit testimony from petitioner as to why he had failed to register, had chosen not to remain quiet about his nonregistration, and had rejected various means of evading his obligation under the registration law, the district court ruled that the questions were irrelevant (Tr. 626-627, 630-631).

c. Petitioner also requested a jury instruction that he could not be convicted unless the jury found that he knowingly and willfully failed to register during the week of July 21, 1980, which was the period that the Presidential Proclamation prescribed for persons in his age group to register. The district court refused the instruction on the ground that, as the result of the 1971 enactment of 50 U.S.C. App. 462(d), refusal to register was a continuing offense (Tr. 303). The court instructed the jury that "Section 462(d) of the Military Selective Service Act imposes on eligible individuals a continuing duty to register until they reach age 26" (Pet. App. 17a).

3. By unpublished memorandum, the court of appeals affirmed petitioner's conviction (Pet. App. A1-A3). Relying on its earlier decision in *United States* v. *Wayte,* 710 F.2d 1385 (9th Cir. 1983), cert. granted, No. 83-1292 (May 29, 1984), the court rejected petitioner's claim of selective prosecution. It also held that "[t]he district court's refusal to permit [petitioner] to testify as to his motives and reasons for failing to register was within the court's discretion since such testimony was not relevant to the question of guilt or innocence" (Pet. App. A1). Finally, the court concluded that it need not address the question whether failure to

register was a continuing offense because the allegation in the indictment that petitioner had knowingly and willfully failed to register on or about July 27 "encompass[ed] at least the latter portion of the week of July 21-26" during which he was required to register under the Presidential Proclamation (*id.* at A1-A2).

ARGUMENT

1. Petitioner contends (Pet. 7) that he was impermissibly selected for prosecution under the "passive enforcement" system. That issue is currently before the Court in *Wayte* v. *United States, supra.* As discussed in our submissions in *United States* v. *Schmucker,* No. 83-2035, and *Eklund* v. *United States,* No. 83-1959,[4] we agree with petitioner (Pet. 7) that the instant petition should be held pending *Wayte* and then disposed of (with respect to the first question presented) as appropriate in light of that decision.

2. Petitioner also claims (Pet. 7-9) that the district court erred in excluding evidence regarding his motives in refusing to register with Selective Service. This claim, however, confuses the concepts of intent and motive. The registration statute (50 U.S.C. App. 462(a)) requires the government to prove that the defendant, with knowledge of his obligation and the intent not to comply, "knowingly" did not register as required by law. See U.S. Br. in *Wayte* v. *United States,* at 34. Once that has been established, it is simply irrelevant, as the district court correctly recognized (Pet. App. A16), what the defendant's reasons might have been for his knowing nonregistration. See *United States* v. *Irwin,* 546 F.2d 1048, 1051-1053 (3d Cir. 1976); *United States* v. *Day,* 442 F.2d 1034, 1034-1035 (9th Cir. 1971); *United States* v. *More,* 436 F.2d 938, 940 (9th Cir.), cert. denied, 402 U.S.

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[4]Copies of our petition in *Schmucker* and our brief in response to the petition in *Eklund* are being sent to counsel for petitioner.

1012 (1971); *United States* v. *Boardman,* 419 F.2d 110, 114 (1st Cir.), cert. denied, 397 U.S. 991 (1970); *Harris* v. *United States,* 412 F.2d 384, 388-389 (9th Cir. 1969); *United States* v. *Smogor,* 411 F.2d 501, 504 (7th Cir.), cert. denied, 396 U.S. 972 (1969); see also *United States* v. *Pomponio,* 429 U.S. 10 (1976). Here, by his own admission, petitioner was aware of his obligation to register with Selective Service and deliberately refused to comply. Accordingly, the district court correctly excluded evidence of petitioner's motivation.[5]

3. Finally, petitioner argues (Pet. 9-12) that failure to register with Selective Service is not a continuing offense. Petitioner acknowledges (Pet. 3 n. 1, 12) that this is the same issue that is presented in *Eklund* v. *United States, supra.* For the reasons stated in our brief in response to the petition in *Eklund,* petitioner's argument is without merit and does not warrant further review.

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[5] *United States* v. *Bowen,* 421 F.2d 193 (4th Cir. 1970), upon which petitioner relies, is not to the contrary. In that case, the defendant was indicted for willfully failing to report for induction. At trial, however, he was not allowed to testify why his action was not willful (421 F.2d at 194, 197). Here, by contrast, petitioner had a full opportunity to present testimony on the relevant mental element of the offense with which he was charged and was prevented from discussing only the immaterial issue of his motives for knowingly refusing to register.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the decision in *Wayte* v. *United States* and then disposed of in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DEPUE
Attorney

SEPTEMBER 1984

(3)

No. 83-2098

IN THE

Supreme Court of the United States

October Term, 1984

BENJAMIN H. SASWAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Pursuant to this Court's Rule 22.5, petitioner Benjamin H. Sasway replies to the arguments first raised in the Government's Brief in Opposition (hereinafter "Opp."):

1. **Exclusion of Defense Evidence** (Question 2): The respondent does not deny that the decision of the Ninth Circuit upholding exclusion of petitioner's proferred testimony in his own defense is in conflict with this Court's decision in *Crawford v. United States*, 212 U.S. 183 (1909). Indeed, the respondent does not even mention *Crawford. See* Opp. 8-9. Nor does the respondent seriously argue that the decision below does not conflict with the Fourth Circuit's decision in *United States v. Bowen*, 421 F.2d 193, 197 (1970).[1] Finally, the respondent does not even suggest that petitioner's Question 2 is not substantial or important. Instead, without even attempting to defend the self-contradictory holding of the court below that the District Court had "discretion" to exclude petitioner's testimony because it was "irrelevant,"[2] the respondent argues that the trial court's action was correct. This is not a persuasive reason to deny certiorari.

Most of the cases cited by respondent do not support its position. In *United States v. Smogor*, 411 F.2d 501, 504 (7th Cir.), *cert. denied*, 396 U.S. 972 (1969) the court acknowledged that it "fail[ed] to comprehend the defendant's argument." In others, the issue was the extent to which a good faith belief in the unconstitutionality of conscription may constitute a negation of wilfullness, which is quite different from the issue in this case. *United States v. Boardman*, 419 F.2d 110, 114-16 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); *Harris v. United States*, 412 F.2d 384, 388-90 (9th Cir. 1969); *United States v. More*, 436 F.2d 938, 940 (9th Cir. 1971) (per curiam); *United States v. Day*, 442 F.2d 1034

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[1] In a footnote (Opp. 9, n. 5), respondent states that *Bowen* "is not to the contrary," but can point to nothing distinguishing that case from this one. The statutory violation charged in the two cases was identical (50 U.S.C. App. Section 462(a), clauses 4 and 6) and hence the mental element involved in each was the same. Moreover, in each the defendant was permitted to testify a little, but not to explain his reasons. As recognized in *United States v. Irwin*, 546 F.2d 1048, 1051 n. 7 (3d Cir. 1976), relied on by respondent, *Bowen* is simply inconsistent with the view of the court below.

[2] If the testimony was actually "irrelevant," exclusion was mandatory, not discretionary. Fed. R. Evid. 402. Compare *id*. 403. As we showed in the petition, however, and further explicate below, the excluded evidence, while not conclusive, was surely relevant and helpful to the defense.

(9th Cir. 1971) (per curiam).[3] Only *Irwin*, note 1, *supra*, actually supports the decision below, and it conflicts with *Bowen, supra*, which supports petitioner. In short, there is a conflict in the circuits (and with this Court's precedent) warranting certiorari.

Moreover, it is the respondent's position, not petitioner's, which "confuses" (Opp. 8) basic principles of criminal law and evidence. Respondent seems to suggest that because good motive is not a defense, as such, *evidence* of motive is entirely irrelevant. This is plainly wrong, as would be the equivalent argument by a defendant that simply because the existence of a motive to commit a crime does not itself move guilt, it follows that evidence of such motive is irrelevant to the issues of identity or intent. The distinction--that evidence need not be conclusive to be relevant--is recognized in the standard jury instruction explaining the relationship of motive and intent. 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* 14.11, at 395 (3d ed. 1977); *United States v. Pomponio*, 429 U.S. 10, 11 (1976) (per curiam) ("'Good motive alone is never a defense . . .' [C]onsequently motive [is] irrelevant except as it [bears] on intent.").

In a Selective Service case, as the Fourth Circuit recognized in *Bowen*, a defendant's evidence of motive does bear on the intent element. *Accord, Ex parte Stewart*, 47 F.Supp. 415, 417 (C.D. Cal. 1942). As respondent recognizes, the *mens rea* of these offenses is a strict requirement of specific intent to violate the law, coupled with actual knowledge of one's legal obligations. The respondent contends that "*Once that has been established*," the defendant's reasons are "simply irrelevant." Opp. 8. This fails to recognize that nothing is established in a criminal case until the jury renders its verdict. The weight of the prosecution's case can hardly determine the admissibility of defensive proof. Where purpose is thus made substantively relevant, evidence of motive--while not conclusive--must be admissible.

In this case, the government recognized the relevance of the defendant's reasons by offering selected statements by him--including a television interview--during its case in chief. It then succeeded in

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[3] The *Harris* and *Boardman* courts also upheld exclusion of defense evidence of good character--rulings now of questionable validity under Fed. R. Evid. 404(a)(1)--and exclusion of defense evidence supporting the reasonableness (as contrasted with the motivating force or genuineness) of the defendant's beliefs. Neither kind of evidence is at issue here.

slamming shut the door it had opened when the time came for defendant to offer an explanation. This is neither fair nor lawful.

In short, no reason for denying the writ on Question 2 has been offered, and the petition should be granted.

2. **Continuing Offense** (Question 3): As was the case with Question 2, the respondent offers no real reason to deny the writ on this question, which divided the Eighth Circuit, five to four, and which this Court recognized as sufficiently important to warrant review by deciding *Toussie v. United States*, 397 U.S. 112 (1970). Nor (as with Question 2) does the respondent even attempt to defend the decision below on the ground on which the Ninth Circuit rested it, no doubt recognizing that court's patent violation of the rule announced in *Chiarella v. United States*, 445 U.S. 222, 237 n. 21 (1980). See Petition 12-13. Instead, the respondent simply incorporates by reference its opposition to review in the Eighth Circuit case, *United States v. Eklund*, 733 F.2d 1287 (1984) (en banc), *cert. pending*, No. 83-1959.

The new points made in the *Eklund* opposition and adopted by respondent in this case may be briefly answered. The majority decision in *Toussie* necessarily rested upon a recognition that the violation of a continuing duty does not necessarily constitute a continuing offense. Petitioner here (unlike petitioner Eklund) has not denied that Congress, in enacting 50 U.S.C. Section 462(d), did intend to establish a kind of continuing *duty* to register. Nevertheless, Congress did not attempt to satisfy the criteria enunciated by the Court in *Toussie* for the establishment of a continuing offense. The continuing offense doctrine has impact on at least three issues: contemporeneity of an act and intent (as here), statute of limitations (as in *Toussie*) and venue. *Toussie* recognized that a statutory provision dealing with one of these issues does not necessarily affect the others. 397 U.S. at 120-21 n. 16 (discussing venue cases). Likewise here, where Congress responded to the *Toussie* decision by writing a special, extended statute of limitations, it did not thereby create a continuing offense for all purposes.[4]

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[4] That some members of Congress, including some sponsors of the amendment, did not clearly understand this Court's *Toussie* decision and so erroneously identified a continuing duty with an automatic continuing offense cannot change this result. *See Eklund* Opp. 13-14.

Petitioner has argued that respondent's proposed construction of the statute raises a serious Fifth Amendment problem which the construction proposed by petitioner avoids.

By adopting its *Eklund* response rather than actually addressing petitioner's arguments in this case, the respondent answers our Fifth Amendment contention only obliquely. To the extent it does, however, it misses the mark.[5] "First," respondent claims, "in no case has a late registrant been prosecuted for his previous failure to register." *Eklund* Opp. 17. Alas, this is untrue. *See, e.g. United States v. Boucher*, 509 F.2d 991 (8th Cir. 1975); *United States v. Klotz*, 500 F.2d 580 (8th Cir. 1974); *Kaohelaulii v. United States*, 289 F.2d 495 (9th Cir. 1968). Likewise, it is reassuring to read that "a nonregistrant may be punished only once for failing to register regardless of whether that offense is a continuing one." *Eklund* Opp. 10 n. 11; *see also id*. 17. Nevertheless, the government cites no authority for this claim. An August 25, 1982 letter from David J. Kline, the Justice Department official "responsible for supervising enforcement of the Selective Service laws" (Brief for U.S., *Wayte v. United States*, No. 83-1292, at 4) takes the opposite position. (See Appendix to this reply).[6]

A continuing duty to register late, once the Proclamation period has ended, is undeniably compulsion. It is a legislative command of the sovereign. To contend that an obligation to register after expiration of the six-day Proclamation period (60 days since 1981) is no *further* "compulsion" than existed during that period is no answer. See *Eklund* Opp. 17-18. Only compulsion to self-incriminate is relevant under the constitutional privileges. The legal obligation to register which existed during the prescribed period is not Fifth Amendment "compulsion" at all. *Cf. South Dakota v. Neville*, 459 U.S. 553, 562-64 (1983). After that period expires, the privilege comes into play for the first time, much as it revives upon expiration of a grant of immunity (under which there is compulsion, but not to self-incriminate). See *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983). The district court's construction of this criminal

[5] In *Eklund*, the petitioner argues that the statute is unconstitutional in violation of the Fifth Amendment. In this case, petitioner argues that the respondent's proposed construction of the statute would create a Fifth Amendment problem, while petitioner's construction would avoid it. Accordingly, by merely adopting its *Eklund* response, respondent has not answered petitioner's argument.

[6] This letter, which is included in the appendix, was released by the government to the defense in *United States v. Kerley*, No. 82-CR-47-D (W.D. Wis.)

statute, as defended by respondent, should be rejected because it leads unnecessarily to this difficult constitutional problem. *Cf. United States v. Jennings*, 603 F.2d 650 (7th Cir. 1979); *United States v. King*, 402 F.2d 694 (9th Cir. 1968) (misprision of felony, 18 U.S.C. Section 4, held inapplicable on Fifth Amendment grounds to persons concealing and failing to report their own crimes).

Nothing in *Selective Service System v. MPIRG*, 104 S.Ct. 3348 (No. 83-276, decided July 5, 1984), is contrary. The part of the statute there involved, 50 U.S.C. App. Section 462(f), did not purport to impose any obligation of late registration, only an opportunity to qualify for certain benefits in exchange for doing so. Hence, it did not *compel* self-incrimination. 104 S.Ct. at 3358.[7] Implicitly, *SSS v. MPIRG* acknowledges the seriousness of the self-incrimination problem posed by the government's "continuing offense" theory. For the very act of late registration "necessarily admit[s]," *id.* at 3359 n. 16, prior nonregistration, which is a crime, and provides admissions of two of that crime's elements, sex and age.

CONCLUSION

For the above reasons, as well as for those stated in the Petition, certiorari should be granted.

DATED: October 8, 1984

Respectfully submitted,

CHARLES T. BUMER
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JONATHAN M. SOFFER

Attorneys for Petitioner

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[7] Petitioner here does not share the *SSS v. MPIRG* respondent's ripeness and standing problems arising from their failure to attempt late registration while seeking immunity or claiming the privilege. 104 S.Ct. at 3358-59. Petitioner raises the Fifth Amendment point only as an argument in favor of strict construction of the statute under which he is being prosecuted.

APPENDIX

LL:DJK:skb
TYPED: 8-22-82
Honorable Gerald D. Fines
United States Attorney
Central District of Illinois
Post Office Box 375
Springfield, Illinois 62705

Attention: Charlene A. Quigley
Assistant U.S. Attorney

Re: Selective Service
Non-Registrant Prosecutions

Dear Mr. Fines:

By letter dated August 13, 1982, you enclosed a copy of a letter you proposed sending to non-registrants in your district. You also raised two questions. First, you inquired about venue in cases in which college students have permanent residences outside the district in which they attend college. Second, you asked whether a person who refuses to register after conviction can be prosecuted a second time.

I. VENUE

[Paragraph deleted by Department of Justice prior to release of document.]

Since there may exist a choice of districts in which prosecutions may be brought, we prefer that cases be brought in the districts which would be most convenient for the defendants, assuming that such prosecutions would not create proof problems. Your district would seem to be the more convenient place for the prosecution of a defendant who would, at the time of indictment, be attending school there.

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[1] The court in *United States v. Sasway*, Criminal Case No. 82-05004-GT (S.D. Cal.), found on August 18, 1982, that the failure to register was a continuing offense.

[2] Presidential Proclamation 4771, set out as a note to 50 U.S.C.A. App. § 453.

[3] 50 U.S.C. App. § 462(d).

[4] Presidential Proclamation 4771, § 1-201.

II. CONTINUING OFFENSE

You also asked the following questions:

> Can a person be prosecuted for continued refusal to register? If not, is he then immune from prosecution for non-induction?

You then stated that, "If there is a legal immunity, it would seem that for many [,] $10,000 or a short jail stay is a small price to pay to avoid military service."

No mandatory induction into the military presently exists. Consequently, even if the failure to register were not a continuing offense, accepting a prosecution and penalty for non-registration could not be equated with avoiding military service.

Nonetheless, in our view the failure to register is a continuing offense. Consequently, a person could be prosecuted a second time if he continued to refuse to register.[5]

[Paragraph deleted by Department of Justice prior to release of document.]

III. CONCLUSION

We hope that this letter has been of some assistance to you. We enclose a copy of a memorandum which deals with both venue and the continuing nature of violations under 50 U.S.C. App. § 462.

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[5] The offense discontinues at age 26. See 50 U.S.C. App. § 462(d).

Please feel free to call us at FTS 724-7144 if you have any questions or if we may be of further assistance.

Sincerely,

LAWRENCE LIPPE, Chief
General Litigation and
Legal Advice Section
Criminal Division

BY:

DAVID J. KLINE
Attorney

Enclosure

No. 83-2098

IN THE

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BENJAMIN H. SASWAY,
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PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to this Court's Rule 22.6, petitioner Benjamin H. Sasway invites the Court's attention to a new case not available at the time of petitioner's last filing, dealing with the exclusion of defense evidence (Question 2).

The Minnesota Supreme Court has unanimously ruled that a criminal defendant has a federal due process right to testify about his intent and motive in explaining his conduct to the jury. *State of Minnesota v. Brechon*, 352 N.W. 3d 745, 750-751 (Minn. 1984). This decision by a state court of last resort is in direct conflict with the decision of the Ninth Circuit Court of Appeals in this case. (Rule 17.1(b).)

CONCLUSION

For the above reasons, as well as for those heretofore stated, certiorari should be granted.

DATED: November 2, 1984

Respectfully submitted,

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